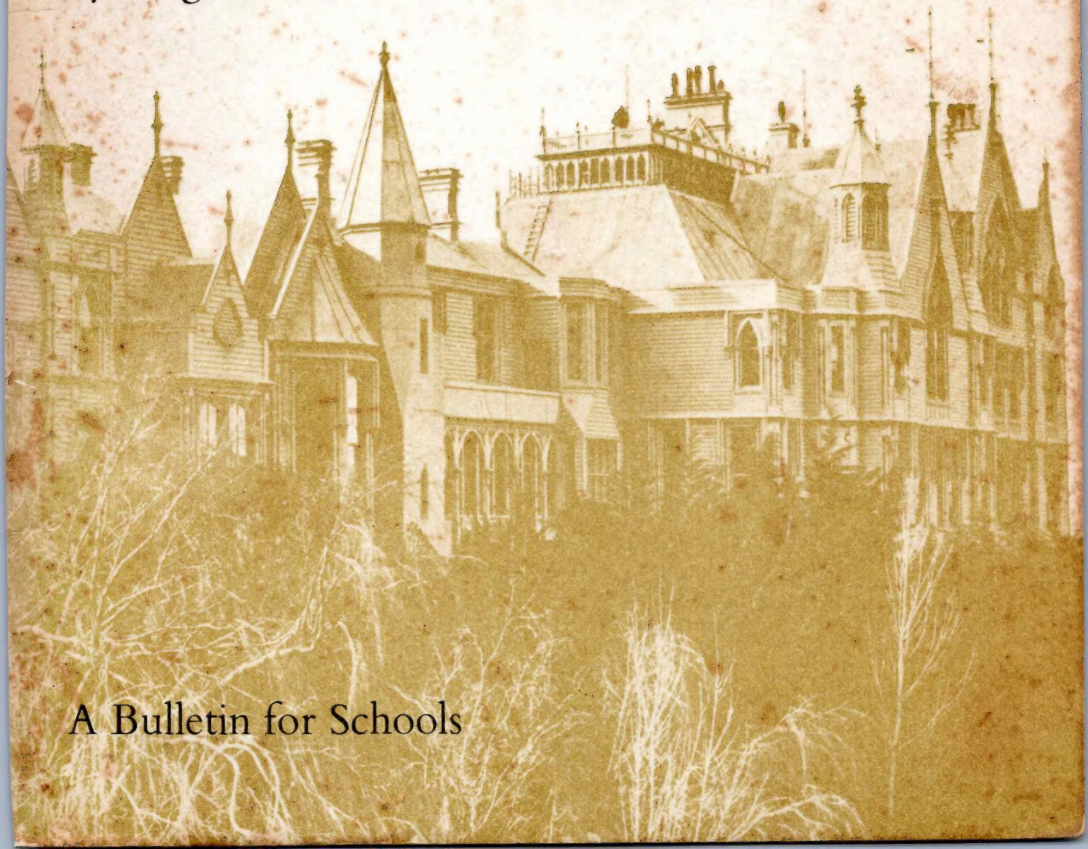
THE DEVELOPMENT OF THE NEW ZEALAND CONSTITUTION

by Roger Clark



A Bulletin for Schools

PUBLIC
DINNER

On THURSDAY, 15th April,

At Barrett's Hotel, Wellington

To Commemorate the Intelligence

OF THE

ISLANDS OF NEW ZEALAND

Being declared

INDEPENDENT

Of New South Wales,

And of the adjustment of

Differences between the

Government

AND THE

NEW ZEALAND COMPANY.

Colonel Wakefield in the Chair.

Tickets 25s.---Dinner on Table at 6 o'clock precisely.

Printed at the office of the "New Zealand Gazette.

Claire O'Connor
Jan 1978.

THE DEVELOPMENT OF THE NEW ZEALAND CONSTITUTION

by Roger Clark A Bulletin for Schools (E)

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INTRODUCTION

New Zealand is a democracy. You will know the definition of democracy popularised by Abraham Lincoln: 'Government of the people, by the people, for the people.' The aim of this little book is simple. Government of the people, by the people, for the people doesn't mean a thing if the people—you—don't know how the system works. A constitution contains the ground rules of a country's system of government, the body of basic rules regulating the way in which a country's business is transacted. If you want to vote, stand for Parliament, complain about injustice, be a competent

Parliament Buildings, Wellington.

public servant or urge that New Zealand follow a particular foreign policy, you need to have some knowledge and understanding of the way in which the Constitution works. Government cannot be of, by or for you if you don't understand the Constitution. And the only way to get anything like a reasonable understanding of the New Zealand Constitution is to look at its history. This book attempts to show how it became the way it is. It comes to you with the thought that unless the people care enough to understand the way their system of government works and to keep its machinery well-oiled, we might as well forget about democracy.

A Constitution

The constitution of a country is the body of basic rules governing the way in which the country's business is transacted. It is common to place the machinery for transacting this business into three broad categories: the legislature, the executive, and the judiciary.

The *legislature* is the body which makes general rules, called laws, dealing with things like crime, the use of the road and the organisation of commerce.

The *executive* administers or puts those laws into practice, and handles the country's relations with its people and with the governments and people of foreign countries.

In the event of a dispute about the content of the law or about the facts relevant to a possible breach of the law, the courts, or *judiciary*, decide which view is correct.

The constitution defines these three classes of officials and how they operate.

The Sources of the New Zealand Constitution

One of the outstanding characteristics of the New Zealand Constitution is that, like the British Constitution on which it is modelled, it is not contained in any single document comparable with the Constitution of the United States of America, or those of members of the Commonwealth like Western Samoa, Tonga and Fiji that have become independent in recent years. In order to find out what the New Zealand Constitution is, we need to look first at a number of acts of the British and New Zealand Parliaments: for example, the New Zealand Constitution Act of 1852 enacted by the British Parliament, parts of which are still in force; the Electoral Act of 1956, which governs the procedure for electing members of Parliament; and the

Judicature Act 1908, dealing with the judges. (The last two are Acts of the New Zealand Parliament.) But an examination of these and perhaps a dozen other less important acts would still leave us with only the bare bones of our Constitution. To put flesh on the bones, it is necessary to examine the 'customs' or 'conventions' of the Constitution. These are rules which have been developing over the years, not by the making of laws, but by the practice or customs of the officials concerned.

The most important of these customs or conventions at the present day is that the Governor-General, who is nominally the head of the Executive and part of Parliament, acts only on the advice of his Cabinet ministers. He does not himself exercise any real, independent executive or legislative powers. The development of conventions such as these comprises the major part of the story in the following pages.

The New Zealand Constitution and the 'Westminster Model'

New Zealand, in common with the majority of other former British colonies, inherited the main characteristics of the British Constitution. Writers on Commonwealth constitutions often speak of the British Constitution as the 'Westminster Model'—'Westminster' because the British Parliament meets at Westminster, and 'Model' because it has become the pattern for so many others. The two main characteristics of the Westminster Model, in terms equally applicable to Britain and New Zealand today, may be summarised as follows:

1 *A representative legislature, or parliament:*
In the United Kingdom, this consists of two chambers, the House of Lords and the House of Commons. The House of

Lords has no power to initiate or amend legislation imposing taxation or affecting revenues. Only the House of Commons, elected by the people as a whole, wields this power. New Zealand, as we shall see, has had only one chamber since 1950—the House of Representatives, popularly elected like the House of Commons.

2 *Cabinet or 'responsible' government:*
The executive function is in theory carried on by the Queen, who is also the Head of State—or, in the case of New Zealand, her personal representative, the Governor-General. But, in fact, the most important officials in the Executive are the Cabinet ministers, or ministers of the Crown. Except in the unusual event of a coalition, ministers are selected from the members of the party having a majority of seats in the legislature, and are said to be 'responsible' to Parliament. This means today that their official actions and the actions of the departments under their control may be the subject of parliamentary scrutiny and, in extreme cases, they may be expected to resign when things go wrong. This system may be contrasted with that, for example, of the United States where the Head of State, the President, is himself elected and personally selects the members of the Executive, who carry out his policies.

Independence

'Independence' relates to the power of a country to handle its own affairs without interference by the government of another country. There are today more than 130 countries that are regarded as independent. Many of them are ex-colonies of Britain and France in Africa and Asia, which have become independent in the last twenty years. Writers on international law list a number of characteristics of an

independent state: It consists of a more or less defined territory or geographic area which has a government answering to no outside legislative or executive power (with the possible exception of an international organisation such as the United Nations). It has the authority to send and receive diplomatic representatives such as ambassadors, and to enter on its own behalf into international agreements (or treaties) and other international relations—including the power to declare war. Fundamental to the question of whether a country is independent is the question of where the power lies in relation to matters such as these.

Independence by Evolution

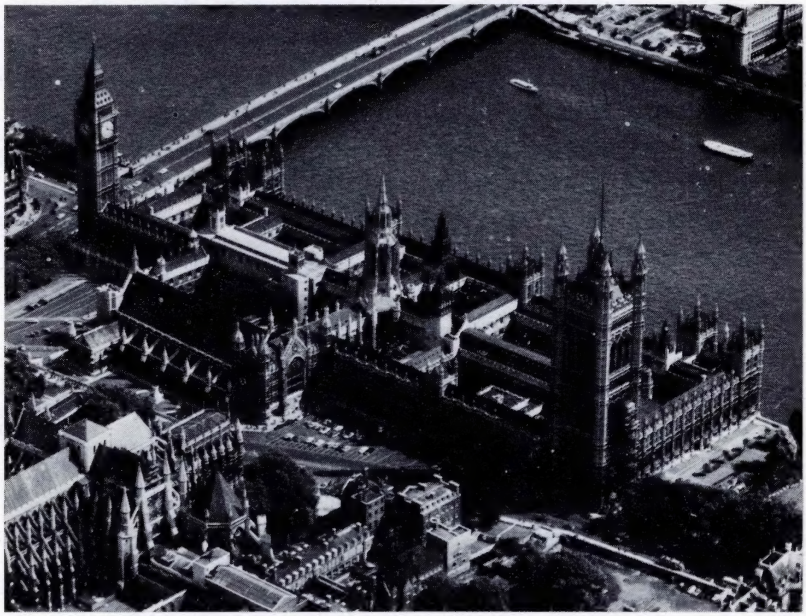
After New Zealand became a British colony in 1840, it was clearly not independent. Today, it just as clearly is. The shift of power from Westminster to Wellington was not a sudden or violent process like the revolutions which brought independence to the United States, most of South America, Algeria and Vietnam. It was a process of gradual evolution by which the Westminster Model was taken over and modified in a period of a little over a hundred years, beginning with the acquisition of New Zealand by Great Britain in 1840. At some time during this period, New Zealand became an independent state.

In most ex-colonies, it is possible to point to a particular day—Independence Day—on which the colony became independent. For example, Western Samoa, a former German colony which New Zealand administered on behalf of the League of Nations and later the United Nations, became independent on 1 January 1962. No such date can be given for New Zealand, although I shall be mentioning the times at which New Zealand officials—legislators, administrators, judges—assumed the final say over things that are usually

regarded as the symbols of independence. As you read the following pages, ask yourself a question: 'When did New Zealand finally become independent—1907? 1918? 1939? 1947? When did power pass from United Kingdom officials to New Zealand officials?'

Questions

1. Which other countries besides New Zealand have a constitution based on the Westminster Model?
2. What is Cabinet? How did the term originate?
3. Find some examples of recent laws enacted by Parliament. Notice what a wide range of subject-matter they cover. Try to follow in the newspaper the progress of a particular bill through Parliament.



Houses of Parliament, Westminster.

1

The Crown Colony Period

New Zealand constitutional history falls into three main periods: the Crown Colony period from 1840 to 1853; the period of the shift of power from 1853 to about 1947; and the final period of undoubted independence. Most of this book is devoted to the middle period.

The first period in New Zealand constitutional history is that from the acquisition of New Zealand by Britain in 1840 until representative government was introduced in 1853. It is usually referred to as the period of Crown Colony Government. A Crown colony is essentially one in which the important decisions are made by legislative, executive and judicial officials appointed by the authority of, and responsible to, the agents of the government in London.

The Treaty of Waitangi

Historians and lawyers have devoted an incredible amount of paper and ink to discussing the process by which New Zealand became part of the British Empire in 1840. The two main views are that this event took place either by what the scholars call 'Cession', or by 'Discovery and Settlement'. Cession is what would occur if, for example, the appropriate New Zealand officials were to transfer the ownership of Stewart Island to Australia. Settlement occurs when outsiders declare, in relation to a country, 'This is ours,' and proceed to move in. Which of these processes actually was at work in New Zealand depends on the view

Signing of the Treaty of Waitangi.

one takes of the Treaty of Waitangi.

Mainly for commercial and humanitarian reasons, the British Government decided in 1839 to make New Zealand a colony. A legal document described as 'Letters Patent' was issued in the name of Queen Victoria by her ministers in Westminster, extending the limits of the colony of New South Wales to include any New Zealand territory 'which is, or may be, acquired in sovereignty by Her Majesty'. Since nothing had yet been acquired, Captain William Hobson was entrusted with the following tasks:

1. 'To treat with the aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any parts of those Islands which they may be willing to place under Her Majesty's Dominions.'
2. 'To claim sovereignty on the ground of discovery if he found it "uninhabited" except by a very small number of persons in a savage state, incapable from their ignorance of entering independently into any Treaties with the Crown.'

Between 6 February and September 1840, Hobson obtained the signatures of approximately five hundred Maori chiefs, mainly from the North Island, to the authoritative Maori text of the document known as the 'Treaty of Waitangi'. The first fifty or so signatures were, of course, obtained at Waitangi, in the Bay of Islands.

In addition, an English version of the Treaty was signed by Hobson and by thirty-nine chiefs at Waikato Heads and Manakau in mid-March and late April 1840.

On 21 May, Hobson proclaimed British sovereignty over the North Island on the ground of cession, and over the South Island on the ground of discovery.

It is clear enough that the South Island became British by discovery and settlement, as Hobson proclaimed. The Maori population of the South Island was sparse and not centrally organised, so that there were no officials who could effectively pass title to the Queen. It has also been suggested that, in spite of the Treaty and of Hobson's proclamation declaring the North Island to be acquired by cession, it, too, was acquired by settlement.

As the passage I have quoted from Hobson's instructions indicates, the main purpose of the Treaty for the British was that the chiefs should cede to the Queen their sovereignty or power to govern. But the argument is made that international law deems 'native tribes' incapable of exercising sovereignty and entering into international relations, and that the document accepted by the Maoris was therefore not a valid treaty. This view carries with it the possible corollary that Hobson and the Colonial Office had entered into a shabby farce, cajoling the Maoris into signing a document not worth the paper it was written on. I do not believe that this was the case. The Colonial Office itself had given at least some recognition to the capacity of the Maoris to enter into relations having a legal effect. In October 1835, a group

of thirty-five chiefs of the northern part of the North Island had assembled at Waitangi under the auspices of the British Resident, James Busby, and declared that New Zealand was an independent state under the designation of 'The United Tribes of New Zealand'. The Colonial Office did not apparently accept that this declaration made the chiefs of the United Tribes (who, after all, came from only part of the country) the effective government of the whole country. But they were regarded as having some legal status, and Hobson was told by the Colonial Office that it regarded New Zealand 'as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert.' This was not to say that they could not act separately rather than 'in concert'. It was also why it was necessary for Hobson to deal not only with the United Tribes, but also with the other tribes in the country. Hence the English version of the Treaty (and the Maori text is to a similar effect) speaks of signatures or marks being attached by 'we, the Chiefs of the Confederation of the United Tribes of New Zealand . . . and we, the separate and independent Chiefs of New Zealand. . . .'

The better view of international law, recognised by some recent writers, is that where, as in the case of the North Island, a substantial number of chiefs, having fairly effective authority over a substantial part of the country, enter into a transaction, international law will recognise its validity. It is true that there are some doubts as to whether the concept of sovereignty was fully understood by the chiefs, and even as to whether the notion of the transfer of sovereignty was adequately expressed in the Maori language of the Treaty. These doubts should probably be resolved in favour of the Treaty's effectiveness. In short, the North Island was ceded to the Crown pursuant to the Treaty.

However, the confusions surrounding the Treaty do not stop with the question of its effectiveness to pass title to the Queen. In particular, it is uncertain what it was that the Maoris got in return for their cession of sovereignty. Certainly they were given the 'rights and privileges of British subjects', but it was far from clear what this meant. Further, most English versions of the Treaty (like the one signed by thirty-nine Maori chiefs and Captain Hobson) have the Queen guaranteeing to the Maoris their lands, forests, fisheries and other properties. The actual Maori text of the Treaty, however, mentions only *wenua* (land), *kainga* (homes), and *taonga katoa* (all other possessions). The difference is plainly significant in relation to fishing rights, and perhaps in other ways also.

Again, the English texts have the chiefs yielding to the Queen 'the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.' The notion of 'pre-emption' is ambiguous. It seems to have been understood by Hobson and the Colonial Office to mean that the Crown ought to be the sole purchaser—that the Maori owners could never deal directly with the settlers. On the other hand, it could be taken to mean that the Crown was to have the first option to purchase. If Maori owners wished to sell, they should first offer it to the Crown. If no agreement was reached, then they might deal with private purchasers. The Maori text appears to be equally ambiguous, and many of the Maoris seem to have understood it in a sense different from Hobson's. These confusions and misunderstandings were to haunt race relations in the future.

Clearly, the drafters and the signatories of the Treaty failed if their endeavour was to produce a precise legal document. With the passage of time, historical events

sometimes take on an aspect quite different from what they had for the parties involved. It is perhaps best to ignore legalities and look at the Treaty in its modern significance as a symbol of good will, a pledge of good faith, between Maori and Pakeha.

The 1840 and 1846 Constitutions

While the formalities of establishing British sovereignty were being completed, New Zealand was a dependency of the colony of New South Wales. In November 1840, an act of the Imperial Parliament was passed, authorising the Crown to make New Zealand into a separate colony, and to set up a nominated legislative council. In May of 1841, New Zealand was proclaimed a colony separate from New South Wales.

However it was that the British Government came to exercise power over New Zealand in the name of Her Majesty, it was faced in 1840–41 with the problem of organising a governmental structure. The chief executive official was the Governor. He took his orders from the Colonial Office in London, although he was advised and assisted by an Executive Council composed of the Colonial Secretary, the Attorney-General and the Treasurer. By June 1842, he also had the following officials to assist him: a Collector of Customs, a Surveyor-General, a Colonial Surgeon, a Harbour Master, a Chief Protector of Aborigines, a Colonial Storekeeper, a Commissioner of Claims, a Superintendent of Public Works, a Postmaster-General, a Registrar of the Supreme Court, and a Registrar of Deeds. The Governor had also set up a legislature, called the Legislative Council, of seven persons—the Governor himself, the three members of the Executive Council and three nominated Justices of the Peace—to make laws 'for the peace,

order and good government' of the colony. The first Supreme Court judge, Chief Justice William Martin, was appointed from London in 1841. At that stage there was no real attempt to render the judiciary independent, and judges, like public servants and members of the Legislative Council, could be dismissed at will.

In order to forge links between the British and customary Maori forms of law and justice, a system of resident magistrates and Maori assessors was devised under the auspices of the Chief Protector of Aborigines. Many of the assessors who heard disputes along with the magistrates were chiefs who brought their *mana* to the task of resolving disputes. Two of the most common problems that came before them concerned thefts of property and assaults on other persons. In 1844, a law provided that in any case of theft, the guilty party could escape imprisonment by paying four times the value of the stolen goods to the victim. This idea brought into European justice something of the Maori principle of *muru*, or obtaining recompense for the victim from the offender or the offender's family. In 1845, a similar principle of payment was applied to offenders who committed assault.

Dissatisfaction with this non-representative system of Crown colony government was widespread in New Zealand. And in London, the New Zealand Company, which was at that time largely responsible for the colonisation of southern New Zealand, pressed for the institution of a representative legislature. A constitution was devised by an Act of the Imperial Parliament in 1846, but those parts providing for representative government never became operative. The Act also provided for the division of the country into two provinces, New Ulster and New Munster, each with its lieutenant-governor and nominated legislative council under a governor-in-chief and general legislative council, but only the provincial council of New Munster was ever summoned. The

settlers formed constitutional associations to oppose nominee provincial councils and to campaign for self-government.

The principle of representation included in the 1846 Act was repeated in the Imperial Parliament's New Zealand Constitution Act 1852, which remains the basis of our present Constitution.

The 1852 Constitution

The Constitution Act 1852, which was largely based on recommendations made by Governor Sir George Grey, established a central legislature called the General Assembly with power to legislate for the 'peace, order and good government of New Zealand'. It consisted of a Governor, a Legislative Council appointed by the Governor, and an elected House of Representatives. The voters were male householders over the age of 21 occupying a dwelling with an annual value of £10 if in a town, or £5 if in the country, or being in possession of a freehold estate with an annual value of £50 or a leasehold estate with an annual value of £10. Put simply, only persons owning or renting property of a certain value had the vote. The actual provision was, nonetheless, rather more generous than that existing at the time in England. However, it still excluded all women. It also excluded most Maoris (who comprised about half the population at that time), since the great majority of them who occupied land owned it in communal style and had not, as individuals, the property qualification.

Despite these limitations, it is fair to describe the legislature as 'representative' in the sense discussed in the Introduction. The Constitution Act did not, however, institute 'responsible' government. No change was made to the position of the Governor's Executive Council, nor were his powers limited by law in the legislature or the executive.

The Act empowered the Governor to 'prorogue or dissolve'* the House of Representatives and the Legislative Council 'at his pleasure'. It provided, further, that when a bill had been passed by the Legislative Council and the House of Representatives and was presented to the Governor for his 'assent' (that is, his signature of approval), he might 'declare according to his discretion, but subject nevertheless to the provisions contained in this Act and to such Instructions as may from time to time be given in that behalf by Her Majesty . . . that he assents to such Bill in Her Majesty's name, or that he refuses his assent to such Bill, or that he reserves such Bill for the signification of Her Majesty's pleasure thereon.' He was also empowered to return the bill to the two Houses with a recommendation for amendments. 'Reserved' bills were not to have force until assented to by the Queen. Bills would not, of course, become law until they received the assent of either the Governor or the Queen. In addition, whenever the Governor assented to a bill, he was required at the first convenient opportunity to 'transmit to one of Her Majesty's Principal Secretaries of State an authentic copy of such Bill so assented to'. Her Majesty, at any time within two years after the receipt of the copy, might 'disallow' the act, thus rendering it of no effect.

The power of the Governor to assent or refuse assent was never of much practical significance in New Zealand. In fact, no Governor or Governor-General has ever refused assent for a bill (although, as we shall see, bills were occasionally disallowed). The power to assent or refuse assent is still contained in the law, but undoubtedly it is now subject to the convention that the Governor-General must act only on ministerial advice—and it is unlikely that he would be advised

*See page 59 for the meanings of these terms.

not to assent. There was, however, an odd incident in 1877 when the Governor declined to follow the advice of the Premier (and former Governor), Sir George Grey, to veto a bill. Grey's majority in Parliament was shaky and the bill was passed in a form not satisfactory to him. The Governor rejected the advice to veto and signed the bill. This seems to have been one of the last occasions on which ministerial advice was rejected and a similar incident is unlikely to happen today.

By the 1850s, it was well established in the United Kingdom that the Queen acted in matters relating to colonies only on the advice of her ministers. Thus, the effect of the provisions permitting instructions to be given to the Governor, and of the Queen's power of disallowance, was that the final word on government in New Zealand lay in some matters with British ministers. These provisions of the Constitution Act were not repealed until 1973, but their effect had been completely altered long before then by the conventions discussed in the next chapters.

The drafters of the Act appreciated that it was too much to expect that European laws and organisation could immediately and completely be extended to the Maori population and that some special arrangements might be needed, at least for the present. Accordingly, section 73 of the Act provided:

> And whereas it may be expedient that the Laws, Customs and Usages of the aboriginal or native Inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their Relations to and Dealings with each other, and that particular Districts should be set apart within which such Laws, Customs, or Usages should be so observed.
>
> It shall be lawful for Her Majesty, by any Letters Patent

to be issued under the Great Seal of the United Kingdom, from Time to Time to make Provision for the Purposes aforesaid, any Repugnancy of any such native Laws, Customs, or Usages to the Law of England, or any Law, Statute, or Usage in force in New Zealand, or in any part thereof, in anywise notwithstanding. . . .

This section was never used for making 'Provision for the Purposes aforesaid' but something of the spirit of it can be found in the continuing efforts to maintain a separate system of Maori land ownership and in the Maori Councils Act of 1900 which allowed a limited measure of self-government in Maori districts. Along with the assessor system and the payment of restitution to victims of thefts and assaults, which have been mentioned earlier, these are almost the only ways in which Maori laws, customs and procedures were permitted to contribute to the new structure of law and government in New Zealand.

The Provinces

One other aspect of the 1852 Act, of tremendous importance at the time, deserves mention. In addition to making provision for a central government, the Act authorised the division of the country into provinces, and the establishment of provincial governments with wide powers. Originally there were six provinces, corresponding to the areas of European settlement: Auckland, New Plymouth (later renamed Taranaki), Wellington, Nelson, Canterbury and Otago. Later, new provinces were established in Hawke's Bay, Marlborough, Southland and Westland. Each province had an elected superintendent and an elected council. The British Parliament had intended the superintendents and councils to be like mayors and city councils, but in practice they behaved more like miniature parliaments.

The creation of a provincial system was the major way in which the British system was adapted to local circumstances. In making his suggestions for a constitution to the Colonial Office, Governor Grey noted that there were six principal towns, five of them with good harbours, each amounting really to a separate 'colony'. He went on:

> [They] were settled at different times, each upon a totally distinct plan of colonisation, and by persons who proceeded direct to their respective Colony, either from Great Britain or from the neighbouring Australian colonies, and who rarely passed through any other New Zealand Settlement previously to reaching the Colony which they now inhabit; and who, except in a few instances, rarely travel from their own Colony to any neighbouring settlement.
>
> Each of these chief towns carries on an independent trade with Great Britain, and with the neighbouring Australian Colonies, and hardly any interchange of commerce takes place between them, since they at present produce nearly all the same commodities, and require the same kind of supplies; which they naturally seek at the cheapest mart; whilst the cost of a transport from a port in the Australian colonies, but in trifling degree, if at all, exceeds the corresponding charges from a port in New Zealand.

The provinces were never as powerful and independent as the states in a federation like the United States or Australia. But as long as communications were poor, they played an extremely important part in day-to-day government, even though in a small country it was an expensive business to have two fairly separate systems of government. They collapsed because of financial difficulties during the economic recession of the late 1860s, and were abolished in 1876 because of their opposition to Vogel's policies of national development and conservation.

Questions

1. What is a colony? What is the difference between a colony acquired by cession and one acquired by discovery and settlement? What other Pacific territories are, or have been, colonies?
2. What is a 'legislature'? What is the difference between 'representative' and 'responsible' government?
3. See if you can find a copy of the original Maori text of the Treaty of Waitangi.

A settler bartering tobacco for potatoes and pumpkin.

2

The Introduction of Responsible Government

When the first Parliament elected under the 1852 Act met in 1854, the House of Representatives passed a motion asking for 'establishment of ministerial responsibility in the conduct of legislative and executive proceedings by the Governor'. The Administrator, who was temporarily acting as Governor, had no instructions on the matter, and wrote to the Colonial Office. After some months, the British Government agreed to the introduction of responsible government. A new Governor, Sir Thomas Gore Browne, arrived in 1855 and introduced a form of responsible government in 1856. He recognised that in all matters under the control of the Assembly, he would be guided by ministers responsible to the Assembly, whether or not he agreed with their advice. But in respect of matters 'affecting the Queen's prerogative and Imperial interests generally' (which meant mainly international relations), he would listen to advice. He would not be bound to accept the advice, but if he differed from it, he would, if ministers so desired, refer the matter to London.

One matter named by Governor Gore Browne as an imperial subject was 'all dealings with the native tribes, more especially in the negotiations of purchases of land'

In order to understand what else was contemplated by 'imperial interests', it is necessary to digress for a moment to consider events in Canada late in the 1830s. Following widespread discontent over relations with the mother country, rebellions broke out in Canada in 1837. Lord Durham was appointed to study the causes of the rebellions, and in 1839

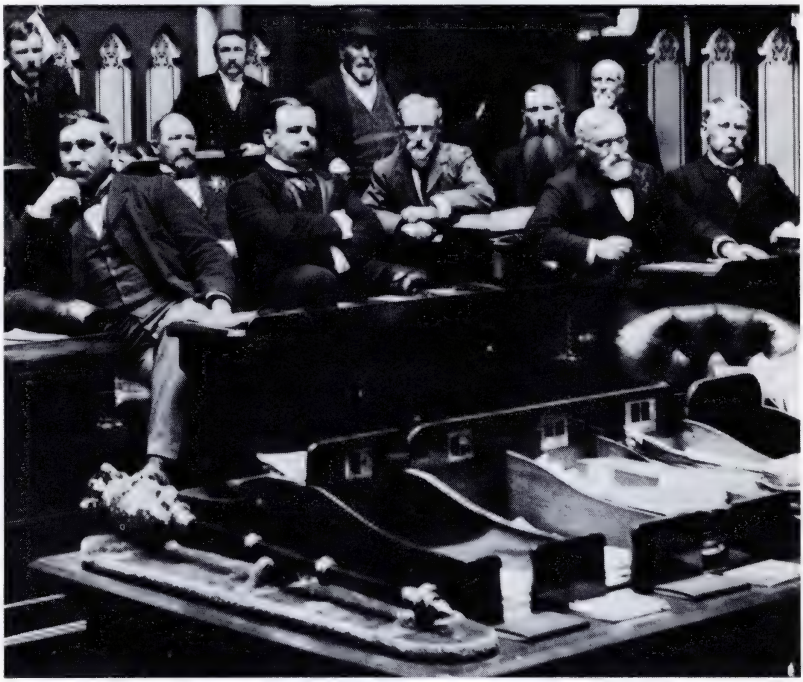
he produced what is probably the most important document in the history of the modern Empire and Commonwealth, his *Report on the State of Affairs in British North America.* His remedy for the discontent was to grant responsible government, but certain matters were to remain in the hands of the mother country: 'The constitution of the form of Government—the regulation of foreign relations, and of trade with the mother country, the other British colonies and foreign nations—and the disposal of public lands.' Responsible government was introduced in these terms in Canada in 1848, and the same imperial reservations were made in the case of New Zealand in 1856, except that the Governor remained responsible for native affairs, including land purchases, and the ministers took over responsibility for the disposal of public lands.

There was, however, a theoretical consideration that made it difficult to conceive of different policies in different parts of the Empire. The problem is usually referred to as that of 'the divisibility of the Crown'. The questions were asked: 'What if the Queen of England, through her English ministers, had one policy and the Queen of New Zealand, in the person of the Governor-General, acting on the advice of the New Zealand ministers, had another? Would not this place the Monarch in an impossible situation? Could she speak with two voices?' The problem has ceased now to be of any great importance. When, for example, the Queen read the speech from the throne to the Jamaican Parliament in 1966 (written by the Jamaican Government), references in the speech to Rhodesia were not worded as the British Government would have worded them. The Queen had previously made different statements concerning Rhodesia, on the advice of the British Government. No one doubts, any more, the propriety of 'the Queen in right of the United Kingdom' speaking in a different voice from 'the Queen in right of Jamaica' or 'of

New Zealand', but in the 1850s it was a significant issue.

Both Governor Gore Browne's arrangements and the Durham formula involved limitations on the powers of both the executive and the legislative branches of government.

The gradual transfer of responsibility in these matters from the imperial executive and legislature to the New Zealand executive and legislature is the gist of the remainder of this story. I shall be discussing mainly the question of the limitations on the executive (for example, in native affairs and foreign relations) in the following chapter, and will pick up the questions of the powers of legislature (especially the question of 'the constitution of the form of government') in chapter 4.



House of Representatives, about 1900.

Appointment of Judges

An important function performed by the Queen on the advice of her ministers is that of appointing judges. Since such a practice could lead (and in some cases has led) to appointments being made on political grounds, an attempt has been made to keep the judges independent of the executive by giving them 'security of tenure'. This means that they hold office either for life or until they reach a prescribed retiring age, and may not be dismissed in other than the most exceptional of circumstances. Early New Zealand judicial appointments were made through the Colonial Office and, like other colonial civil servants, judges could be sacked at any time. The appointment of judges was not specifically referred to in the imperial reservations contained in the Durham Report, or in the arrangements Governor Gore Browne made with his ministers. During the 1856 session of Parliament, resolutions were passed, recommending that judges be given security of tenure, and that they be appointed by the Queen on the recommendation of an English judge, named for that purpose by the New Zealand Government. The resolutions were sent to England, with the suggestion that their principles be included in an act of the British Parliament amending the 1852 Constitution Act. The British Government was not favourably impressed with the proposed method of appointing judges—even if it was aimed at ensuring the independence of the judiciary. The Colonial Office said that it could not agree to binding the Queen to follow the recommendations of an English judge who was responsible neither to the British nor to the New Zealand Parliament. It was their policy to be guided by the local advisers of the Crown in the selection of judges and other officers in colonies under responsible government. It invited the New Zealand General Assembly to pass its

own legislation on the subject of security of tenure.

The General Assembly duly did this in 1858. From 1862 onwards, all judges have been appointed by the Governor (since 1917, the Governor-General) on the recommendation of New Zealand ministers. The custom now is that the Minister of Justice or the Attorney-General makes the recommendation of all judges and magistrates except the Chief Justice. The Prime Minister nominates the Chief Justice. The convention has developed that appointments as judges are not made as a reward for political favours, and the independence of the judiciary is not in doubt.

Conclusion

The Constitution Act 1852 did not grant responsible government. Rather it paved the way for its introduction by the process just described. Indeed, the provisions of the Act empowering Her Majesty to issue binding Instructions to the Governor were to prove just as effective a means of transferring responsibility to ministers in and after 1856 as they were initially from 1854 to 1856 in keeping the Governor responsible to the British Government.

Again, no legal change was needed to make way for individual ministers and the Cabinet as a whole. The Governor simply appointed to his Executive Council people who had the confidence of the legislature to replace the permanent officials who retired and were given pensions by Parliament. Even today there is nothing written into the law about the appointment of the Cabinet. But the custom is strong: when a government is defeated in a general election, the Prime Minister hands in his resignation and the Governor-General calls upon the leader of the victorious political party to form a new government. The important decisions are made by the Cabinet, meeting in the absence of the Governor-General and presided over by the Prime Minister.

Any formal business, such as the approval of Orders-in-Council (see pages 41 and 53), is transacted with Cabinet and the Governor-General meeting together to form the Executive Council.

Questions

1. What is meant by 'the Crown'? What was the problem about the 'divisibility' of the Crown?
2. What is the 'Speech from the Throne'? When does it occur? Who writes it?
3. The Constitution of Fiji provides that 'The Chief Justice shall be appointed by the Governor-General acting after consultation with the Prime Minister and the Leader of the Opposition.' Why do you think that this procedure is laid down? Should it be used in New Zealand? Can you suggest other ways to ensure the independence of the judiciary?
4. What are the names of the different New Zealand courts? One of them is the Court of Appeal, which sits in Wellington. What is a court of appeal? In certain cases there is a further right of appeal to the Judicial Committee of the Privy Council which meets in London. This body also gets cases from some, but not all, of the other members of the Commonwealth of Nations. Sometimes New Zealand judges sit as members of it. Is it a good idea for an independent country to allow its lawsuits to be determined by a tribunal sitting so far away? Is the idea of a Commonwealth court a good one?
5. Visit your local courthouse and watch a court in session.

3

Transfer of the Executive Power

This chapter deals with the continuing transfer of the executive power to New Zealand ministers. Two overlapping developments were taking place which it is not always possible to separate in a clear-cut manner. First, there was the whittling away of Durham's imperial reservations, which could be seen as a hallmark of colonial status. Second, there were the changing New Zealand conventions regarding the exercise of the royal prerogative, which did not *necessarily* involve issues of colonial status, although they could be seen this way. Even in England, the conventions that were slowly narrowing the Monarch's powers to act independently were still developing well into the twentieth century. For example, there was a fuss over Lloyd George's 'People's Budget'. Similar issues arose between New Zealand ministers and the Governor or Governor-General acting on the Queen's behalf. In the discussion that follows, I talk first about the Durham reservations and then mention two matters, the prerogative of mercy and the question of appointments to the Legislative Council, which fit more into the second category of changing conventions.

Native Affairs and 'Self Reliance'

Responsibility for 'native affairs' was retained in the hands of the Governor. This was an indication of the lingering wish of humanitarians to protect the Maoris from exploitation by the settlers. The ministers agreed to this arrangement

because, if war broke out, it would be an imperial war, to be fought with imperial troops and paid for out of the imperial treasury. In effect, this was what happened in the 1860s until the British Government insisted that New Zealand take over responsibility for both Maori affairs and its internal security. When the last of the imperial forces were withdrawn in 1870 despite settlers' protests, Maori affairs came, by convention, fully under the control of New Zealand ministers New Zealand, as a self-governing colony, had to do without imperial aid and become self-reliant.

The Regulation of Trade

The regulation of trade was another responsibility reserved by the British Government. This affected colonies such as New Zealand in two ways. In the first place, the colonies automatically became parties to commercial treaties concluded by the British Government with foreign countries. This was modified after 1882, when the British Government began including in all its commercial treaties a clause excluding all self-governing colonies like Australia, Canada and New Zealand from the operation of the treaty unless they applied to come in within a stipulated period of time. Secondly, the colonies could not themselves enter into trade and similar agreements without the intervention of the British Government. New Zealand had shown some interest during the 1860s in entering into negotiations with the United States, on the entry of New Zealand wool into that country. But it was not until the Imperial Conference of 1923 that the British Government recognised that New Zealand was entitled to conclude its own trade treaties. Our first commercial treaty was with Japan in 1928 and, since that time, a large number of trade agreements have been entered into.

Development in this area was again by custom. No imperial legislation was needed to bring about constitutional change.

Foreign Affairs

Entering into commercial treaties is only one aspect of the broader question of the conduct of international affairs. Apart from isolated examples, such as pressing its interests in the Pacific and attendance at technical conferences dealing, for example, with international mails, all of New Zealand's foreign affairs during the nineteenth century were conducted by Great Britain. This was, to some extent, inevitable in view of its small size and geographical isolation. In addition, the mainstay of New Zealand's defences was the British Navy. New Zealand statesmen like Vogel, Seddon, Ward and Reeves acknowledged the importance of this protection. Rather than seeking to cut off the imperial ties in relation to foreign affairs, they argued for the creation of some type of imperial council, including representatives of the colonies. This would give New Zealand a voice in policy-making without the loss of the protection of the British Navy.

Such suggestions came to nothing, and New Zealand had little to do with the formation of British policy towards Germany in the years before the outbreak of the first World War in 1914. The British declaration of war was regarded by the United Kingdom and New Zealand Governments, and by academic writers, as being equally applicable to New Zealand and the other Dominions. It was, however, recognised during the course of the war that, if the Dominions were to be involved in large-scale conflicts, they must play some part in the diplomacy leading up to—or seeking to avoid—such conflicts. Accordingly, they were separately represented at the Peace Conference in 1919 that gave rise to the Treaty of Versailles and the birth of the

League of Nations. In addition to 'the British Empire', the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and India became separate members of the League. There are writers who take the view that from this time Canada, Australia, New Zealand, South Africa and the Irish Free State had become independent under international law. India was clearly an exceptional case and was not so far advanced along the road to independence. New Zealand's Prime Minister, Massey, certainly did not subscribe to this view when he said in 1922 that he 'did not agree with everything that had been said, that in signing the Peace Treaty, we became independent nations. That is absolute nonsense, and the wish of the people who so expressed themselves was in many ways father to the thought.'

Nevertheless, in 1926, the New Zealand Government accepted the famous Balfour Report which described Great Britain and the Dominions (at that stage, Canada, Australia, South Africa, New Zealand, the Irish Free State and Newfoundland) as:

> . . . Autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

New Zealand did not in the 1920s follow up any independence that she may have achieved in international affairs by appointing diplomatic representatives in foreign countries. It was not until 1941 that New Zealand's first diplomatic representative—a Minister to the United States—was appointed, and the Department of External Affairs (now the Ministry of Foreign Affairs) was not created until 1943. Further, it was only after the first Labour Government came to power in 1935 that New Zealand publicly expressed a

point of view in the League of Nations which diverged from that of the United Kingdom.

It is perhaps fair to add that, in general, New Zealand did not feel any need to take a different line from that of the mother country. It is often argued that it was only after the Japanese attack on Pearl Harbour and the fall of the British base in Singapore that New Zealand was forced to adopt an independent foreign policy. This does not mean that the power to do so did not exist—simply that it was not exercised.

The power to declare war is one of the factors in assessing a country's independence. The effect, so far as the Dominions were concerned, of Great Britain's declaration of war on Germany in 1939 has been much discussed. The Irish Free State remained neutral, while the others, in various ways, made what amounted to separate declarations of war. (Australia was an exception, and merely copied the 1914 precedent.) The *New Zealand Gazette* of 4 September 1939 carried the following proclamation dated the 3rd, the day that Britain declared war on Germany:

> . . . His Excellency, the Governor-General, has it in command from His Majesty, the King, to declare that a State of War exists between His Majesty and the Government of the German Republic, and that such state of war has existed from 9.30 p.m. New Zealand standard time, on the third day of September, 1939.

News of the expiry of the British ultimatum to Germany, which was the last link in the chain leading to war, reached the New Zealand Cabinet a few minutes before midnight on 3 September. Cabinet then apparently decided on the issue of the proclamation. Professor F. L. W. Wood has pointed out in his book *The New Zealand People at War: Political and External Affairs* that the legal position was worse than obscure:

. . . The prerogative of declaring war and peace had not been entrusted by the King to his Governors-General. Only the King could declare war, or some agent specifically authorised by him. The New Zealand proclamation asserted that the King had instructed the Governor to act: but such instruction would be a grave violation of constitutional convention if issued without the advice of His Majesty's New Zealand Ministers. The documents therefore required us to believe that at 11.52 p.m. the New Zealand Cabinet reached a decision and cabled advice to the King in London, in time for the King's instruction to reach the Governor-General before midnight. It seems easier to think that the New Zealand Cabinet, secure in its own unanimity and in the obvious consensus of opinion in the country, had acted with common sense and unlegalistic loyalty.

The significance of the proclamation was, however, clear enough: New Zealand had acted on its own initiative to take the gravest step in foreign relations—a declaration of war. The developments of convention which I have been discussing meant that each Dominion was free to take its own steps to join the war—or not. The decision to do so, the exchange of diplomatic representatives with the United States of America and the U.S.S.R. during the war, and the part played by the New Zealand delegation at the founding of the United Nations in 1945 firmly established New Zealand's independence in international affairs.

The House of Representatives.

The Prerogative of Mercy

Under the heading of 'the prerogative of mercy', writers on constitutions talk about the power of the Queen or the Governor-General to reprieve persons sentenced to death (normally by 'commuting' the sentence to one of imprisonment); to pardon a person (that is, to declare either that he was not guilty of the crime of which he was convicted or that he is forgiven); and to grant what is known as 'remission' of penalty (that is, the offender does not have to pay any or part of his fine or serve any or part of his sentence of imprisonment).

In the opinion of the Colonial Office in the middle of the nineteenth century, the exercise of the prerogative of mercy should not be influenced by political considerations, and the Governor should therefore exercise it according to his personal discretion. After the introduction of responsible government in 1856, it became necessary to clarify the position, and in 1867 an amendment was made to the Governor's Instructions requiring him, in the exercise of the prerogative, to act 'on his own deliberate judgment', recording his reasons at length in any case where he rejected advice given by ministers. The question was not seriously argued in New Zealand until 1891. The fate of a murderer was the issue which brought the matter to a head. John Ballance, the Premier,* insisted that 'all acts of administrative government within the colony should, without exception, be done of the advice of ministers.' The Cabinet advised the Governor to commute the sentence. He did so, and the next year his Instructions were amended so that he was to

*Until 1902 it was usual to describe the leader of the Government as 'Premier', but the term 'Prime Minister' has been used since then. The Government leader in partly independent Commonwealth territories and in the states of Australia is still described as 'Premier'.

act on advice in the exercise of the prerogative, except where imperial interests were concerned. The exception relating to imperial interests has never been of any practical importance. Strangely, it remains in the current Instructions to the Governor-General, which have not been revised since 1917. It is, by convention, a dead letter.

Appointments to the Legislative Council

In 1892, Mr Ballance's Liberal Government was having trouble in getting its legislation through the Legislative Council, which had an overwhelming conservative majority. He decided to rectify the situation by advising the Governor to appoint 12 new Liberal members of the Council. Under the Constitution Act, appointment to the Council was by the Governor, but the Act did not say how the appointment was to be carried out. Lord Onslow, the Governor, said that he could make his own decisions on the matter, and refused to make the appointments. At the time, he was due to leave New Zealand, and he left a note for his successor, Lord Glasgow, explaining his views. Lord Glasgow also refused. Mr Ballance then wrote a forceful memorandum to the Colonial Office. The Colonial Office, in effect, told Lord Glasgow not to be so silly and that he should do what Ballance told him.

As far as I know, no Governor or Governor-General since then has refused to act on a minister's advice, although some have occasionally protested while doing so.

At this point, 1892, the New Zealand executive was essentially self-governing in all internal affairs. New Zealand was proclaimed a 'Dominion' as from September 26, 1907. But that proclamation simply recognised the existing state of affairs, and did not represent any new development.

The Changed Role of the Governor-General

It is clear that the first Governor of New Zealand, Captain William Hobson, while nominally acting on behalf of Her Majesty, was appointed by, and subject to, the direction of the British Government. Of course, because of the time taken to correspond with Westminster, he exercised a large amount of personal discretion in day-to-day matters. As responsibility in government shifted from Westminster to Wellington, the Governor's role changed. The change was reflected in 1917 by a change in title from Governor to Governor-General, a term which was felt to carry less of the suggestion of subordination to Great Britain. The New Zealand Government first established its right to be consulted when a Governor was being selected in 1896. It is now the custom that the Governor-General is appointed solely on the advice of New Zealand ministers.

As a consequence of the changed status of Dominions, it was recognised at the Imperial Conference in 1930 that the Governor-General is the representative of the King or Queen 'holding in all essential respects, the same position in relation to the administration of public offices in the Dominion, as is held by His Majesty, the King, in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain, or of any Department of that Government.'

Has the Governor-General any Residual Powers?

Obviously, the developments just discussed leave the 'Chief Executive', the Governor-General, largely a figure-head. The result of the arguments in the early 1890s over the exercise of the prerogative of pardon, and over advice on appointments to be made to the Legislative

Council, established clearly that in all but the most exceptional cases the Governor-General should act on the advice of his ministers. Most writers on the constitution agree that there may be some exceptional cases relating to the appointment of a Prime Minister and to the dissolution of Parliament in which the Queen in England, or the Governor-General in New Zealand, might act without, or contrary to, advice. But there is no example of this occurring in New Zealand this century. In theory, the Governor-General has quite wide powers by virtue of this provision in the 1917 Instructions:

> In the exercise of the powers and authorities vested in him, the Governor-General shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council, he may act in the exercise of the said powers and authorities in opposition to the opinion of the Council, reporting the matter to Us [i.e., the Queen] without delay, with the reasons for his so acting.

Like so much else in the 1917 Instructions, the provision has been rendered virtually meaningless by convention.

A Governor-General, like the Monarch, has the rights first formulated in 1867 by Walter Bagehot in his book *The English Constitution:* 'the right to be consulted, the right to encourage, the right to warn.' Lord Ballantrae (formerly Sir Bernard Fergusson), a recent New Zealand Governor-General, has said that he was well informed by ministers and government departments during his tenure. Adequate information is, of course, essential to the exercise of any of these rights. In a farewell speech, he noted that 'only very rarely had he presumed to exercise his right to advise or to warn the Government on any issue.' He said that there were few such occasions, not half a dozen in all, when he had done this. A Governor-General is unlikely to keep up a barrage of comments on everyday matters of government, but his advice

may well be valuable on occasions, especially if he has expertise in a particular area.

Conclusion

The theme of this chapter has been very simple. Beginning with the grant of responsible government in the 1850s, the centre of executive power shifted from Westminster to Wellington. The shift was largely accomplished by the 1890s in domestic matters—that is, matters primarily affecting only New Zealand, such as Maori affairs, the purchase of land, the exercise of the royal prerogative of mercy, and the making of appointments to the Legislative Council. The transfer of power took place more slowly in foreign affairs, and was not accomplished completely until the 1940s.

No legal changes were needed to the New Zealand Constitution Act or to any other imperial legislation to permit this transfer. Development was by custom and convention.

But legal changes were required to effect the transfer of *legislative* power, and to these we now turn.

Questions

1. What is a treaty? What sort of things are dealt with in treaties?
2. Why was the Balfour Report written?
3. Try to find out how many diplomatic representatives New Zealand has abroad. Where are they? Why do you think that we are represented in those particular countries?
4. Do we need a Governor-General? Is a Governor-General, who is appointed for a limited term of a few years, likely to be able to exercise more or less power than the Queen, who holds her job permanently, does in the United Kingdom? Should New Zealanders be appointed as Governors-General?

4

Transfer of the Legislative Power

As has already been mentioned, the New Zealand Constitution Act 1852 established a 'General Assembly' consisting of 'the Governor, a Legislative Council, and House of Representatives'. The General Assembly was granted power 'to make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the law of England. . . .'

The Legislative Council, which was meant to perform much the same functions as the House of Lords in England, turned out in practice to be a largely ineffective body for most of its existence, and it was abolished in 1950. I shall say more about this later. Its members were appointed by the Governor but, as I have noted, by the 1890s it was established that he must accept any nominations made by the Prime Minister. The important part of the General Assembly was thus the House of Representatives.

A. *Restrictions on the powers of the New Zealand legislature under the 1852 Act.*

Between 1852 and 1947 there were five distinct limitations on the power of the New Zealand Parliament to act independently of Britain:

1. It had only limited powers to amend its own constitution.

2. There were some ill-defined limitations as to the extent to which it could legislate 'extraterritorially' (that is, enact laws having effect outside its own boundaries).
3. It could not pass legislation 'repugnant to the law of England'.
4. The Governor could reserve bills for the Queen's assent.
5. The Queen could disallow acts to which the Governor had assented.

1. Constitutional Amendment

Under the 1852 Act, the New Zealand Parliament had very little power indeed to amend its own Constitution. It could amend only those provisions of the 1852 Act dealing with the qualifications of electors and members, create new provinces, alter the boundaries of existing provinces and amend the powers of provincial councils. Power to amend other sections of the Act was retained by the Imperial Parliament. However, in 1857, the British Parliament passed the Constitution Amendment Act 1857, which gave the New Zealand Parliament power to alter, suspend or repeal all except twenty-one sections of the 1852 Act. These twenty-one sections are often referred to as the 'entrenched' sections. Power to amend one of them was granted in 1862, and it was amended in 1873. Five others became inoperative when the provinces were abolished in 1875, and they were later repealed by the British Parliament. Power was not granted to the General Assembly to amend or repeal the remaining fifteen until 1947—of which more later. Many are still in force and remain the basis of our present Constitution, although the power to amend was exercised in 1950 to abolish the Legislative Council, and to make less dramatic changes in 1970 and 1973.

2. Extraterritoriality

Section 53 of the 1852 Act gave the General Assembly power to legislate for 'the peace, order and good government of New Zealand'. The words 'of New Zealand' in this formula caused all sorts of legal difficulties when the General Assembly came to deal with persons or events outside New Zealand's territorial waters. For example, in 1919, in the case of *The King v. Lander*, the Crown prosecuted a New Zealander who had committed bigamy in England. The Supreme Court held that the legislature had no power to punish crime committed abroad—that was 'extraterritorial', and did not relate to 'the peace, order and good government of New Zealand'. Of course, there was not the slightest doubt that the British Parliament could have passed a similar statute, making it an offence for an Englishman to commit bigamy in New Zealand.

In a later case in 1927, *Tagaloa v. Inspector of Police*, the court took the view that the General Assembly had no power under the New Zealand Constitution Act to legislate in respect of Western Samoa, the mandated territory then being administered by New Zealand on behalf of the League of Nations. Power to do so had to be granted by a British Order-in-Council made pursuant to an act of the Imperial Parliament.

By the 1930s, later decisions of the Australian and South African courts and of the Judicial Committee of the Privy Council in London—the final court of appeal for New Zealand cases—had cast doubts on whether these cases were correct, and had thrown the lawyers into a great state of confusion about what was meant by extraterritoriality. Confusion about whether the courts will regard certain acts of Parliament as valid is a most undesirable state of affairs.

3. Repugnancy

The power of the General Assembly to make laws was subject to the proviso 'that no such laws be repugnant to the law of England'. The notion of 'repugnancy' was another great source of confusion, made even more confused by a series of court decisions which seemed to come to different results. Essentially, the doctrine of repugnancy meant that if imperial law dealt with a certain matter, the legislatures of the colonies were limited in the extent to which they could regulate that matter. The limited powers to amend the Constitution which I discussed in section 1 were a specific case of this restriction. Any attempt by the General Assembly, say, to abolish the Legislative Council would have meant that it was acting 'repugnantly' to the 1852 Act, and that the attempt was therefore invalid.

But the effects of repugnancy went much beyond constitutional legislation. An early problem was what was meant by the term 'law' in the words 'law of England' in the 1852 Act and in similar acts applying to other colonies. The term 'law' normally includes not only statutes passed by Parliament but also the 'common law'—that is, the decisions of the judges over the years which are treated as 'precedents', to guide decisions when similar cases arise again. (For example, most of the rules on contracts are 'judge-made' in this way.)

In South Australia in the early 1860s, a Mr Justice Boothby was cheerfully declaring invalid a whole host of local legislation on the ground that it was repugnant to the common law. Boothby's eccentricities were generally regarded as bad law, but something had to be done. In an attempt to straighten things out, the Imperial Parliament passed the Colonial Laws Validity Act 1865. That Act provided that the doctrine of repugnancy would apply only in the case of conflict with imperial acts which

extended 'by express words or necessary intendment' to the colony in question. Thus, colonial legislation would not be invalid because it departed from the common law or from British legislation which did not apply in the colony itself. The difficulty still remained of determining when an act applied to a colony 'by necessary intendment', and of deciding just what it meant to be repugnant in a concrete case.

By the mid 1920s, the convention had developed that no imperial legislation would extend to a Dominion unless the Dominion so requested—and few such requests were made. The scope for repugnancy in Dominion acts was therefore very small. However, there were still a number of imperial acts, especially some concerning merchant shipping, which had been passed before the convention developed which raised problems of repugnancy.

4. Reservation

In the case of parliaments operating on the Westminster Model, a 'bill' passed by the House or Houses of Parliament does not become law (an 'act') until it has been given the 'assent' of the Queen or her representative, the Governor-General. In New Zealand, this is done by the Governor-General signing his name on a copy of the bill which has been certified as correct by the Clerk of the House of Representatives, along with the words:

> In the name and on behalf of Her Majesty Queen Elizabeth the Second I hereby assent to this Act this day of 19

'Reservation' meant that, instead of assenting in this fashion, the Governor would send a copy to England for the Queen herself to assent or refuse to assent. The Queen would, of course, take the advice of the British Government and would do whatever it told her to do.

Section 56 of the New Zealand Constitution Act 1852

provided that, when a bill was presented to the Governor for assent, he might 'declare according to his discretion, but subject nevertheless to the provisions contained in this Act and to such Instructions as may from time to time be given in that behalf by Her Majesty . . . that he assents to such Bill in Her Majesty's name, or that he refuses his assent to such Bill or that he reserves such Bill for the signification of Her Majesty's pleasure thereon.'

As I mentioned in chapter 1, the power to refuse assent has always been largely a dead letter in New Zealand. It was also quite uncommon for the Governor to reserve bills 'according to his discretion'. The last examples seem to have occurred in the 1920s—on the advice of ministers—but the relevant words in section 56 were not repealed until 1973.

There were, however, a number of cases in which the Governor was *required* to reserve bills. First, there was the case mentioned in section 56 itself, where his Instructions required him to reserve certain classes of legislation. For example, the 1892 Instructions required him to reserve bills dealing with divorce; grants to the Governor; currency; certain differential customs duties; conflict with treaty obligations; discipline of Royal Forces; extraordinary prejudice to the prerogative, to the rights of absentee British subjects, or to British trade and shipping; and bills to the effect of bills previously disallowed or not assented to. Second, section 65 of the Constitution Act required the reservation of bills altering the salary of the Governor or altering the sum voted* for 'native purposes'. Third, much shipping legislation was required to be reserved under sections 735 and 736 of the Merchant Shipping Act 1894. Finally, the Colonial Courts of Admiralty Act 1890 required certain

*Parliament each year approves the sums (called the 'estimates') that are to be spent in the next year for governmental purposes. Each item is said to be 'voted' for a particular purpose.

laws affecting disputes in shipping matters to be reserved.

The first of these cases of obligatory reservation ceased to have any practical effect after 1907. The Governor's Instructions issued when New Zealand became a Dominion no longer contained any orders to reserve, but the theoretical power to issue such Instructions was not deleted from the Act until 1973. Section 65 of the Act, requiring the reservation of bills affecting the salary of the Governor-General and the sum voted for 'native affairs', remained in force until 1970. So far as the salary of the Governor-General was concerned, section 65 was ignored on each occasion on which the Governor-General was given a pay rise between 1957 and 1970. The Governor-General signed the bill on each occasion—apparently without demur. I do not know whether there was a deliberate decision to ignore section 65, or whether someone just forgot about it. At all events, nobody seems to have worried. The vote of money for 'native purposes', now included in the estimates as 'Maori purposes', remained at a nominal $14,000, so that no question of reservation arose. The law caught up with reality in 1970, and Parliament abolished section 65. I shall come back to the other two cases of obligatory reservation dealing with shipping. They, too, have been removed by legislation.

5. Disallowance

'Disallowance' was the Monarch's power to declare invalid colonial legislation to which the Governor had assented. Section 58 of the 1852 Act provided that:

> Whenever any bill which shall have been presented for Her Majesty's assent to the Governor shall by such Governor have been assented to in Her Majesty's name, he shall by the first convenient opportunity transmit to one of Her Majesty's Principal Secretaries of State an

authentic copy of such bill so assented to; and it shall be lawful, at any time within two years after such bill shall have been received by the Secretary of State, for Her Majesty, by Order in Council, to declare her disallowance of such bill. . . .

The Secretary of State was, of course, a member of the British Government and, once again, the Monarch would act on his advice. As far as I have been able to discover, the power to disallow was used only five times in New Zealand, the last occasion being in 1867. In cases where the British Government objected to New Zealand legislation, the British Government seems to have preferred to bring its objections to the attention of New Zealand ministers and suggest that the legislation be amended. The New Zealand Government would usually agree.

Section 58 remained in force until 1973. By convention it was inoperative. In 1947, the decision was made to ignore that part of the section which required the sending of a copy of all assented bills to England. The Government was thus open to the charge that it was acting illegally in not sending copies, and it seems a pity that the legislative position took so long to be tidied up by the repeal of section 58.

B. *Removal of legislative restrictions. The Statute of Westminster 1931 and the New Zealand Constitution (Amendment) Act 1947.*

At the Imperial Conference of 1926, Great Britain and the Dominions were described as 'autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs. . . .' Three years later, a conference of legal experts on 'the Operation of Dominion Legislation'

met to consider how far the law of the Commonwealth was behind the practical realities. The conference recommended that Britain legislate to remove limitations such as those that I have just been discussing. This it did in the Statute of Westminster 1931. The results of that statute in the Dominions in which it was effective were:

1. The doctrine of repugnancy no longer applied.
2. The Dominion could enact extraterritorial legislation without any doubts as to its validity.
3. No act of the United Kingdom Parliament passed after the 1931 Act would extend to a Dominion 'unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment thereof'.
4. The sections requiring reservation in the Merchant Shipping Act and the Colonial Courts of Admiralty Act no longer applied.

These provisions of the Act took immediate effect in Canada, South Africa and the Irish Free State. However, New Zealand (whose representatives had agreed to the Report of the 1929 Conference which recommended the statute) along with Australia and Newfoundland made a request. They asked for the inclusion in the 1931 Act of a provision declaring that the statute would not become operative in those countries unless it was 'adopted' by the parliament of the Dominion concerned.

The statute further provided that nothing in the Act was to be read as giving Canada, Australia or New Zealand any further powers to amend their own constitutions than they already had. Otherwise the general abolition of the doctrine of repugnancy would have meant that the parliaments concerned could have amended their own constitutions. The inclusion of this restrictive provision was understandable enough in the case of Canada and

Australia, where it was desired to keep Britain as the final constitutional authority in order to safeguard the delicate balance between the central and regional governments. But New Zealand seems to have acted from a sense of loyalty to the concept of the British Empire.

The Statute of Westminster was not a great new step towards independence, but was merely an attempt to bring law and practice into step. Nevertheless New Zealand did not adopt the statute until 1947.

Adoption of the Statute and the New Zealand Constitution (Amendment) Act 1947

Because it did not adopt the Statute of Westminster immediately, the New Zealand legislature had no clear power to legislate extraterritorially. Between 1932 and 1947, it was necessary for Britain to legislate each year to ensure that the New Zealand Parliament had power to regulate New Zealand armed forces while they were overseas. Again, special powers had to be given to the New Zealand Parliament to make extraterritorial legislation to control shipping overseas during the Second World War. However, the authorities did not take the obvious step of adopting the Statute of Westminster in order to overcome these difficulties when Australia did in 1942.

That step was not taken in New Zealand until 1947, following the introduction of an Opposition bill to abolish the Legislative Council. The bill, of course, ran into the problem that the Council was set up by section 32, one of the entrenched sections of the Constitution Act 1852. One way to overcome this was to ask the United Kingdom Parliament to abolish the Council. But it was decided instead to tidy up the whole legislative position by:

1. Adopting the Statute of Westminster.
2. Obtaining complete power from the United Kingdom legislature to amend or repeal any sections of the 1852 Constitution Act.

The second step was necessary because of the provision in the Statute of Westminster which stated that the Act did not give the New Zealand Parliament any further power to amend its own Constitution.

Accordingly, the New Zealand Parliament passed the Statute of Westminster Adoption Act 1947, bringing the statute into force in New Zealand, and also passed the New Zealand Constitution (Request and Consent) Act 1947, which asked the United Kingdom Parliament to give it full powers to amend the 1852 Act. This the United Kingdom Parliament did by the New Zealand Constitution (Amendment) Act 1947.

It was not until 1950 that these powers were exercised to abolish the Legislative Council. The General Assembly, or Parliament, now comprises the Governor-General and the House of Representatives. Of course, the custom is firmly established that the Governor-General automatically performs his part in the legislative process by assenting to bills that have been passed by the House.

You will perhaps not be surprised to learn that lawyers still succeeded in having some doubts about the power of the legislature to legislate concerning events beyond the boundaries of New Zealand. I believe that those doubts were unfounded, but in 1973 Parliament amended section 53 of the Constitution Act in a manner designed to put the matter entirely to rest. The section now reads:

> 53. (1) The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.

(2) Without limiting the validity of any Act of the General Assembly passed before the 25th day of November 1947 (being the date of the passing of the Statute of Westminster Adoption Act 1947), every Act of the General Assembly duly passed on or after that date, and every provision of every such Act, are hereby declared to be and always to have been valid and within the powers of the General Assembly.

This broad legislative power of Parliament has implications. Right at the beginning of this booklet I noted that one of the outstanding characteristics of the New Zealand Constitution is that it is not contained in any single document like the Constitution of the United States. Typically, when a country adopts such a written constitution, amendment is made particularly difficult and may not be done by means of a simple majority in parliament. For example, an amendment to the United States Constitution requires approval by two-thirds majorities in both houses of the federal legislature and acceptance by three-quarters of the states to become effective. It is clear that, as the law stands at present, the New Zealand Parliament can make any amendments it wishes to the Constitution and pass laws on any subject by means of the normal legislative process. It could, for example, make New Zealand a republic or create a second chamber for itself—just as it abolished part of itself in 1950. Only a normal act passed by a simple majority would be required to do this.

There are some writers and members of Parliament who take the view that the General Assembly has not the power to make laws affecting the Constitution that, for example, require a three-quarters majority for amendment. My own view, based on decisions of the courts in Australia, South Africa and Sri Lanka, is that it could enact such 'entrenched' legislation, as it is often called. The nearest it

has come to doing so was in 1956, when the Electoral Act was being revised. The Government proposed that it should be made difficult to amend some of the most important provisions of the Act, dealing, for example, with the voting age and the secrecy of the ballot. Accordingly, section 189 of the Act says that certain sections may not be repealed or amended unless the proposal to do so (a) is passed by a majority of seventy-five per cent of all the members of the House of Representatives, or (b) has been carried by a majority of the valid votes cast at a poll of all the electors. The trouble is that section 189 itself can be repealed by a simple majority. Once it is repealed, the protection of this section is gone. My own belief is that the legislature could have said that the special rules for amending or repeal *should also apply to section 189 itself.* (This is sometimes referred to as 'double entrenchment'.) But this was not done. None the less, even if section 189 does not provide a *legal* bar, enforceable in the courts, it is a *moral* or *political* bar. A majority party acting against it would run a grave risk of adverse political consequences.

Related to the absence of such 'entrenched' constitutional provisions is the doctrine that the courts cannot declare acts of the General Assembly invalid on the ground of inconsistency with the 'higher law' of the Constitution. Such a power exists in the United States and in some other countries with written constitutions. It was once exercised by the New Zealand courts, for example, in the bigamy case mentioned on page 41. This was before the legislature obtained full power to define its own authority. If the legislature were to entrench certain provisions—such as some parts of the Electoral Act or the Constitution Act or a Bill of Rights—it would probably also give the courts the power to declare acts passed by Parliament to be of no effect if they contravene the entrenched provisions.

In a more limited way, the New Zealand courts already have this 'power of judicial review', as it is called. Parliament often empowers certain bodies by statute to make what is referred to as 'subordinate' or 'delegated' legislation (subordinate, that is, to acts of Parliament). For example, local bodies, such as your city council, are permitted to make 'by-laws' dealing with the governments of their local area. And the Governor-General or ministers of the Crown are often empowered to make laws, usually called 'regulations', spelling out in detail the broad provisions of an act of Parliament. (Of course, the Governor-General always acts 'on advice' in such a case.) As an example, many of the rules of the road are contained in Regulations made pursuant to the Transport Act 1962. If the 'subordinate legislature' exceeds the power delegated to it—say the Auckland City Council makes a by-law to deal with drains in Wellington, or to make murder no longer an offence—its attempted law-making may be declared invalid by the courts. Legislation so declared invalid is usually described as being *ultra vires*. This is just what Mr Justice Boothby was doing in South Australia in the 1860s (see page 42)—but the courts would have a better reason for interfering in a case such as I have just mentioned than he did!

Conclusion

Under the 1852 Constitution Act, the power of the New Zealand Parliament to function independently of Britain was limited in five ways:

1. It had only limited powers to amend its own constitution.
2. There were limitations as to the extent to which it could legislate 'extraterritorially'.
3. It could not pass legislation 'repugnant to the law of England'.

4. The Governor could reserve bills for the Queen's assent.
5. The Queen could disallow acts to which the Governor had assented.

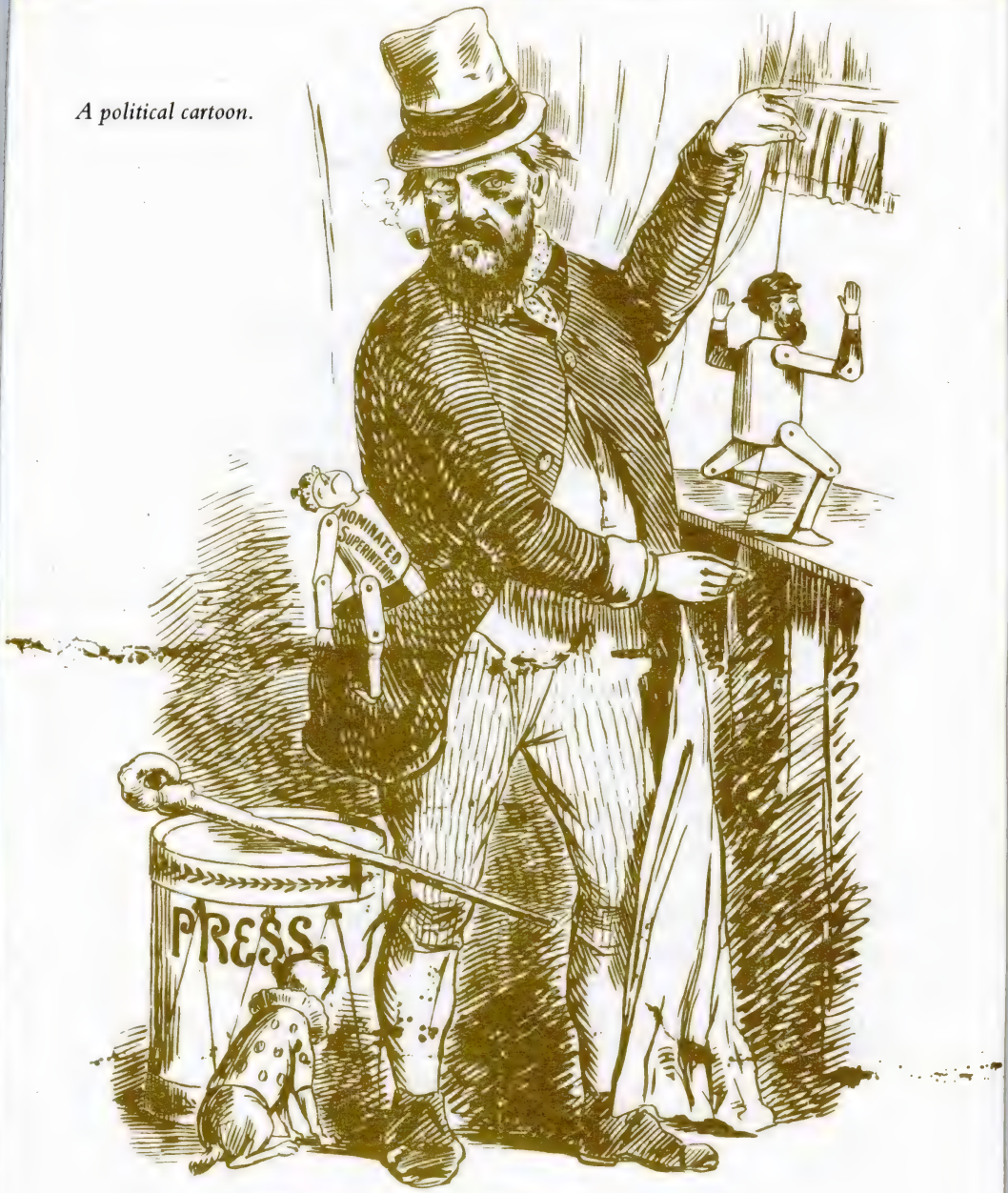
By 1947, the Statute of Westminster, the New Zealand Act adopting it, and the New Zealand Constitution Amendment Act 1947 had removed the first three of these restrictions. The other two had ceased to be operative by convention, but it was not until 1973 that the legal position relating to them was tidied up by New Zealand legislation.

Convention and legislation combined were necessary to achieve the shift of legislative power from Westminster to Wellington.

Questions

1. Why do you think that New Zealand took so long (from 1931 to 1947) to adopt the Statute of Westminster?
2. In the Introduction I invited you as you read this book to ask yourself when New Zealand became 'independent'. Do you have an answer now? Does the difficulty of giving a clear answer suggest that there is not necessarily any easy distinction between dependence and independence? Are there any remaining legal ties between New Zealand and Great Britain?
3. Power to legislate in respect of Western Samoa was conferred on the General Assembly by a British 'Order-in-Council'. What is an Order-in-Council? Who is present at the making of one (a) in the United Kingdom, (b) in New Zealand?

A political cartoon.



MR LANCE
ANNOUNCING HIS POLICY.

5

The Electoral System

While legislative power was shifting from Westminster to Wellington, the electoral systems of both countries were changing with growth of democracy. In New Zealand this development was accompanied by continuing efforts to adapt the 'Westminster Model' to local needs. This chapter discusses four of the main ways in which the system of parliamentary representation has been altered in New Zealand between 1852 and the present.

1. Expansion of the Franchise

In order to register to vote or to be a candidate for election in New Zealand today, a person need be a British subject (or citizen of the Republic of Ireland) of at least twenty years of age, who has resided in New Zealand for at least a year, and has resided in the electorate in which he or she plans to register for at least three months.

As I have already noted, under the Constitution Act 1852 qualifications for electors and parliamentary candidates were more difficult. Only men could vote, and they had to own or rent property to a certain value. Although the franchise was wider under the 1852 Act than it was in Britain at that time, it was by no means universal. The electorate was gradually made even wider by lowering the amount of property required and by extending the vote to groups such as gold miners. The New Zealand Parliament could enact these reforms itself since the qualifications for electors and

candidates were not among the matters reserved for the Imperial Parliament.

In 1879, all adult men who were British subjects and had lived in New Zealand for at least twelve months were finally granted the vote and could stand for election. In 1893, New Zealand became the first country in the world to grant the vote to women.* In fact, a bill enfranchising women had been passed in the House of Representatives the year before. But the Legislative Council had insisted on an amendment giving women the right to vote by mail. Supporters of the bill in the House felt that this could destroy the secrecy of the ballot by making it possible for men to direct the way their wives voted.

Despite this early start in giving women the vote, New Zealand did not permit them to be candidates for election until 1919, and the first woman was not elected to Parliament until 1933.

The voting age was lowered to twenty in 1969, and it seems likely that it will be made lower still in the near future.

Because they owned land communally, Maoris were largely unable to vote under an electoral system based on a property qualification. In 1867, even before there was full manhood suffrage, adult Maori men were given the vote. However, instead of voting for the same candidates as other electors, they were given the right to select four Maori members of Parliament. At the time, the separate representation was regarded as a temporary expedient that would be discontinued following the gradual breakdown of communal land ownership. But once special provisions of this kind are made, it is often politically difficult to do away

*Two states of the United States, Wyoming and Utah, had done so a little earlier at the state level, but New Zealand was the first country to do so nation-wide.

with them, and the Maori seats remain. (At present there are eighty-three 'European' and four Maori seats.) Half-caste Maoris are entitled to vote in either a Maori or a European electorate, but may not vote more than once. Those with more Maori blood than a half-caste must be on a Maori roll, and those with less on a European roll. Since 1967, it has been possible for Maoris of more than half-caste to stand for election in European electorates, and for Europeans to stand for election in Maori electorates.

Many observers see the continuation of the Maori seats as anomalous and not in line with current international views on racial equality. They see it as strange that in an 'integrated' society like ours a New Zealander born in China or the Cook Islands votes for a 'European' candidate, but a Maori New Zealander is on a separate electoral roll and votes for a separate candidate. Further, representation based on race is typical in countries such as South Africa or Rhodesia which do not have New Zealand's good record in racial matters. On the other hand, there is some feeling among the Maori people that the present system at least guarantees that Maori voices are heard in Parliament and that this might not be the case if the separate seats were abolished. It is further argued that there is a continuing need for special institutions at least until racial equality has been fully achieved in practice, and that on a population basis the Maori people are in fact under-represented and should have more than four seats.

Between the 1880s and 1945, the importance of farming to the New Zealand economy was recognised by means of the so-called 'country quota', which was built into the electoral system. A fictitious 28 per cent was added to the rural population when electoral boundaries were determined, and this meant that the countryside received a larger number of representatives for its population than the towns.

Since 1945 the Representation Commission which oversees the division of the country into European electorates following each census has been required to draw electoral boundaries so that the European population in each electorate is approximately the same. The Electoral Act (the legislation now dealing with the franchise and elections in general) also requires the Commission in forming districts to give 'due consideration' to 'the existing boundaries of electoral districts, to community of interest, to facilities of communications, and to topographical features.' When all these factors are taken into account, it may not be possible to have exactly the same number of people in each electorate. The Commission is therefore permitted to make an allowance by way of addition or subtraction of the population not exceeding five per cent.

For a time it was possible for an elector who qualified for the vote in more than one way (for example, by meeting the residence requirement and also by owning the necessary property in the same or a different electorate) to vote more than once. After 1870, it was not possible to vote more than once in the same electorate; and, after 1889, voting in more than one electorate was prohibited.

Since 1945, then, the principle 'one person, one vote, one value' has been fully recognised.

2. The Life of Parliament

The 1852 Constitution Act provided that members of Parliament elected to the House of Representatives under its provision should hold office for a period of five years 'unless the General Assembly shall be sooner dissolved'. Further, the Assembly was to meet 'at any place and time within New Zealand as the Governor shall from time to time by Proclamation for that purpose appoint . . . and the

Governor may at his pleasure prorogue or dissolve the General Assembly.'

The power to 'prorogue' is a power to bring a meeting (or 'session') of the Assembly to a close. The power to 'dissolve' is a power to dismiss all the members and call for a new election. The Governor's powers under the Constitution Act to choose the time and place for meetings of the Assembly, to prorogue it and to dissolve it gave him—and his principals in Westminster—a very wide scope, at least on paper, for directing or influencing its activities. In theory at least, he could always hold the threat of dissolution over the heads of politicians who did not see things his way. In practice, the same development of conventions that we discussed in earlier chapters meant that Governors have, for almost the whole of the period since 1854 when responsible government was introduced, exercised these powers only on the advice of New Zealand ministers. Cabinet, in fact, decides when Parliament will meet and when the session will close.

There has been only one occasion this century when the House was dissolved before its term was up. That was in 1951. The Government had proclaimed a state of emergency and taken drastic powers to deal with a waterfront strike. The Prime Minister, Mr Sidney Holland (later Sir Sidney) made plain his view on the question of where the real power of dissolution lay when he announced in the House of Representatives: 'I will advise His Excellency the Governor-General that he dissolve this Parliament so that the Government's administration can be submitted to the judgment of the people themselves.' The Governor-General, Sir Bernard Freyberg, of course complied, and the Government was returned with an increased majority.

The 1914 Parliament extended its own life until 1919, and the 1938 Parliament extended itself until 1943. These

extensions were both related to the wars then being fought.

Constitutional experts have never managed to agree upon whether there are any circumstances in which the Monarch or the Governor-General might be justified in refusing to grant a dissolution requested by the Prime Minister. Perhaps there might be such situations in a time of great national emergency. But a Governor-General who refused the request of a Prime Minister who, like Mr Holland, commanded a working majority in Parliament, would be almost certain to lose his job.

The life of Parliament was reduced from five years to three in 1879. It has been claimed that three years is too short a life for Parliament. The British Parliament has a maximum life of five years, although premature dissolutions are more common than in New Zealand. Opponents of the present length suggest that the first session is taken up with settling down after the election and the third with getting ready for the next. That leaves only the second session for serious business. It is very hard to establish whether this is so or not. Certainly an examination of the quantity of legislation enacted each session does not reveal any such consistent pattern, and there is a good case for suggesting that frequent elections keep the Government in close touch with the people.

3. The Abolition of the Legislative Council

I have already mentioned the abolition of the Legislative Council, the 'Second Chamber', in a number of other contexts. Since 1950, New Zealand, unlike Great Britain and the majority of other countries which have adopted the 'Westminster Model' (Fiji, to take a recent example), has had a unicameral, or single chamber, legislature.

The suggestion is made from time to time that our liberties would be better safeguarded by having a body which can take a second look at legislation before it is is submitted for the Governor-General's assent. The record of the New Zealand Legislative Council as such a safeguarder of liberty was not a happy one for most of its existence. In the 1890s it held up liberal legislation, such as that dealing with votes for women and old age pensions, for which there was clear support in the country. The only occasion since 1900 on which it appears to have acted as other than a sort of rubber stamp for the activities of the lower house was in 1916. In that year, the Leader of the Council, Sir Francis Dillon Bell, himself a member of the Government, persuaded the Council to amend a government bill dealing with military service by the addition of a clause which exempted those who objected on religious grounds.

The big problem with a second chamber in a small country like ours is that of selecting people to be members of it. We do not have an aristocracy like Britain, or hereditary chiefs similar to those sometimes found in the upper houses of the legislature in some other members of the Commonwealth. If the upper house were popularly elected on the same franchise as the lower house, it would presumably have the same views and would not be much of a safeguard. If it were appointed and some of its members remained in office after the elected representatives responsible for their appointment—as happened in New Zealand in the 1890s—the Council would be out of gear with the popularly elected representatives, and democracy would be frustrated.

All in all, it seems unlikely that a second chamber will be re-established in New Zealand. The best safeguard for our liberties is not more machinery, but an informed and critical public.

4. The Growth of Political Parties

At the same time that executive power was shifting from Westminster to Wellington, strong political parties were growing up within New Zealand. Obviously, if the country is to be governed by a set of ministers responsible to Parliament, those ministers must be fairly certain of commanding a majority in the legislature. The more certain it is of support, the more firm its direction can be. The strongest support comes from a single party with a substantial majority. As the French experience shows, a Cabinet which relies for support on a number of groups, any one of which might at any time withdraw that support, is likely to be weak. When responsible government was first introduced in New Zealand, there were groups or factions rather than parties. They formed unstable coalitions, so that ministries came and went with some rapidity. But during the late 1880s and 1890s, at the time when it was becoming clearly established that New Zealand ministers were responsible for all internal affairs, loyalties developed between a group of Liberals on one side and Conservatives on the other. The Liberal victory in 1890 led to a long period of economic and social reform until the conservative Reform Party took power in 1911. Various labour groups began forming in 1905, and combined to form the present Labour Party in 1916. A three-party system developed, with Reform retaining power until defeated by the Liberal United Party in 1928. Reform and United formed a coalition in 1931, which was defeated by Labour in 1935. Remnants of the coalition and other non-Labour elements became the National Party in 1936. With the brief exception of the Social Credit member of Parliament from 1966 to 1969, all elections since 1935 have returned members of either the Labour or the National Party to the House.

Questions

1. Is party discipline too strict in New Zealand? Should a member of Parliament be allowed to vote according to his conscience and not how the party whips tell him? If the price of such freedom is weaker government, is that price worth paying?
2. Is three years too short a life for Parliament? In 1967 a referendum was held on whether Parliament should have a longer life. What is a referendum? See if you can find out what the result of the 1967 one was.
3. Given that nearly half of the members of the government party are required as Cabinet ministers, do we need more members of Parliament?
4. Should the Maori seats be abolished?
5. What is a census? How often are they held in New Zealand?


NAURU
Ocean I
Gilbert Islands
Phoenix Islands
SOLOMON ISLANDS
Ellice Islands
Tokelau Is
Santa Cruz Is
Northern Group
SAMOA
Apia
Wallis Is
Savaii
Upolu
Tutuila
COOK ISLANDS
Espíritu Santo
NEW HEBRIDES
VANUA LEVU
FIJI
Vila
Suva
Lau Group
VITI LEVU
Vava'u Group
NIUE
Ha'apai Group
Southern Group
NEW CALEDONIA
Loyalty Is
Nouméa
TONGA
Tongatapu
Nuku'alofa
Rarotonga
Tropic of Capricorn
Norfolk I
Kermadec Is
Lord Howe I
TASMAN SEA
Gt Barrier I
AUCKLAND
NEW ZEALAND
NORTH ISLAND
D'Urville I
SOUTH ISLAND
WELLINGTON
CHRISTCHURCH
Chatham Islands
DUNEDIN
STEWART I
Bounty Is
Monday
Sunday
INTERNATIONAL DATE-LINE
Antipodes Is
Auckland Is
Campbell I
Macquarie I
10°
30°
40°
50°
160°
170°
180°
The South-West Pacific
Mercator Projection
Approximate scale on parallels:
0
500
1000 km
50°
40°
30°
20°
10°
0°
Equatorial Scale: 1:50 090 000
(approximately)

6

Some Miscellaneous Matters: Boundaries and Island Territories, The Public Service and the Ombudsman

I have reserved for this chapter discussion of some important constitutional matters that did not fit very neatly into the previous discussion—the boundaries and island territories of New Zealand, the development of the public service, and the creation of the office of Ombudsman.

1. New Zealand Boundaries and Island Territories

The New Zealand Boundaries Act, passed by the British Parliament in 1863, provides that:

> The Colony of New Zealand shall . . . be deemed to comprise all territories, islands, and countries lying between the one hundred and sixty-second degree of east longitude and the one hundred and seventy-third degree of west longitude, and between the thirty-third and fifty-third parallel of southern latitude.

This definition includes the North and South Islands and Stewart Island, as well as the Chatham Islands, d'Urville, Great Barrier, Auckland, Antipodes, and Campbell Islands. The Kermadec Islands were annexed in 1887. The Cook Islands and Niue Island were annexed in 1901, and the Tokelau Islands were incorporated as part of New Zealand in 1948. New Zealand had administered the Tokelaus on behalf of the United Kingdom since 1925.

In 1965, following an election attended by United Nations observers, the Cook Islands became a self-governing state in free association with New Zealand. This means that the Islands are entirely self-governing in all matters except external affairs and defence. External affairs and defence are handled by the New Zealand Government after consultation with the Premier of the Cook Islands. The Cook Islands legislature has full power to end the relationship and make the territory entirely independent, should it so wish. Cook Islanders are New Zealand citizens and, as such, may migrate freely to New Zealand. Many have done so.

Niue Island entered into a similar relationship in 1974.

From 1919 until 1961, New Zealand administered Western Samoa, first as a League of Nations Mandate and later as a United Nations Trusteeship. After Western Samoa became an independent state in 1962, it entered into a Treaty of Friendship under which New Zealand assists in the conduct of its external relations.

Nauru, a German colony occupied by the Australians in 1914, became a joint United Kingdom-Australia-New Zealand League of Nations Mandate and later a United Nations Trust Territory. Australia administered it on behalf of itself and the other two powers until it became an independent republic in 1968.

Since 1923, New Zealand has claimed a large area of the Antarctic known as the Ross Dependency. There is some doubt about the validity of the claim under international law, but the problem is not a serious one. Following the Antarctic Treaty of 1959, the countries with interests in the area have agreed to ensure freedom of scientific investigation and co-operation in the whole area, and to use it for peaceful purposes only. Consequently it does not particularly matter to whom it belongs, and the New Zealand claim may be regarded as in a state of suspension.

2. The Public Service

You will recall from Chapter 1 the titles of the handful of officials whose task it was to help Governor Hobson with the executive work of government. Officials who do this type of work are usually called 'public servants' or 'civil servants'. The group of fewer than twenty in the early 1840s has grown several thousand-fold, to over 200 000 today. Most of these employees can be found in some forty government departments with activities as diverse as the Ministry of Agriculture and Fisheries, the Customs Department, the Government Printing Office, the Railways Department, the Post Office and the Police Department. Others can be found teaching in schools and as medical and nursing staff in hospitals. A smaller number of them can be found working for the various government corporations like the Tourist Hotel Corporation and the National Airways Corporation. (The corporations, with the exception of the State Advances Corporation, which is run like a department, are more independent of ministerial control than the departments.) In addition, a large number of people work for local bodies such as city councils and electricity boards.

This expansion of numbers can be explained in part by increases in the population since the 1840s. It can also be explained in part by the need for more people to perform new tasks as executive power shifted from Westminster to Wellington. But there is more to the story than that. New Zealanders have seldom been scared about entrusting duties to public servants and, as the years have gone by, they have made more and more demands of their government and expected it to perform more and more functions. For example, the State has for many years been expected to engage in trading activities, like those of the State Insurance Office and the Railways—activities that it would be considered taboo to

take out of the hands of private enterprise in many countries of the world.

The increase in the population and the growing demands made by the people upon their government were reflected in the nineteenth century in large expansions of the public service in the areas of public works and Maori affairs, and in the growth of the Post Office and the Railways. The Education Department was set up in 1877 as part of the policy of free and compulsory education for all. The Liberal Government of the 1890s, committed to a broad programme of social welfare, and responding both to older agricultural problems and to newer industrial ones, established such departments as Agriculture, an Advances to Settlers Office, Labour, Valuation, Pensions, Mines, and Industries and Commerce. A further substantial increase in the size and complexity of the public service took place under the first Labour Government, particularly in the areas of housing and social security. There has been a steady increase ever since.

At least since early this century, the convention of a career service, free from political interference in its day-to-day activities, appointments and promotions has been well established. Jobs in government departments are simply not given or taken away to reward or punish supporters of particular political parties. The convention is supported by carefully-drafted provisions written into the State Services Act 1962, and in statutes dealing with particular bodies such as the Police and the government corporations.

3. The Ombudsman

This final section deals with the most significant constitutional development in New Zealand since the adoption of the Statute of Westminster in 1947—the creation

in 1962 of the Office of Parliamentary Commissioner, or Ombudsman.

Sometimes even the best of public servants make mistakes. The Ombudsman, whose main functions (and name) are copied from those of similar Scandinavian officials, is the public's watchdog over many of the activities of members of the public service (including, in certain circumstances, the activities of local officials). If a person feels that he or she has been aggrieved by the actions of, say, the Department of Social Welfare, the Inland Revenue Department or the Police, that person may write a letter to the Ombudsman, or ask for an appointment with him. The Ombudsman's job is to investigate complaints like these in order to see whether the action of the public servant or servants concerned:

(a) appears to have been contrary to law; or
(b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any enactment or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
(c) was based wholly or partly on a mistake of law or fact; or
(d) was wrong.

If the Ombudsman concludes that the actions complained of come within one of these categories, he can recommend that the damage be rectified. Although he has no direct power to enforce the carrying out of his recommendations, in practice almost all of them have been put into effect.

Until the appointment of the Ombudsman, the main ways in which a citizen who had a complaint against a government department could try to do something about it were to write a letter to the minister in charge of the department concerned, or perhaps to another member of Parliament, or possibly to

make a petition to Parliament. None of these courses was entirely satisfactory. A minister was open to the suspicion that he would cover up for the department's mistakes. Other members of Parliament could not always get access to all the relevant governmental files in order to find out what was really going on. And petitions to Parliament are seldom successful. The creation of the Office of Ombudsman was thus a response to the need for an influential and independent functionary of a high status who would have the power to inspect all relevant files in order to see that justice was done between the individual and the State.

Since Sir Guy Powles was appointed as the first Ombudsman in 1962, a large number of people have been successful in obtaining redress of their grievances against the Government. Many others who did not succeed in convincing Sir Guy that they were right have nevertheless written to him expressing their pleasure at the careful way in which he had explained the matter to them.

And the Ombudsman himself has indicated that the New Zealand Public Service is one in which the public can have confidence. Despite its size, the Ombudsman has recorded that he has found '. . . no evidence of corruption or moral obliquity—mistakes, carelessness, delay, rigidity and perhaps heartlessness, but nothing really sinful.'

Questions

1. Can you find on the map the boundaries of New Zealand as defined in the New Zealand Boundaries Act 1863, and the territories added later?
2. What is the population of the Cook Islands and of Niue Island? Why do you think they find it advantageous to retain their constitutional ties with New Zealand?

3. What was a League of Nations Mandate? What is a United Nations Trust Territory?

4. All of the little band of officials appointed to help Governor Hobson (see chapter 1) have their counterparts in the present-day government service. Have a look at the section on government departments in the *New Zealand Official Yearbook*, and see if you can work out which government departments or other agencies have evolved from their work.

5. Why do we need an Ombudsman as well as members of Parliament?

6. The Ombudsman has no power to correct mistakes made by government departments. However, he has power to make those mistakes public in the press and on radio and television. Why do you think that government departments almost always comply with his recommendations?

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The map on page 64 is by Julien Petro.

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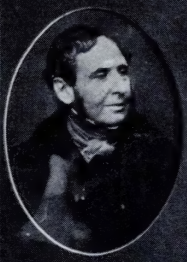
48100E—12,500/7/74 D

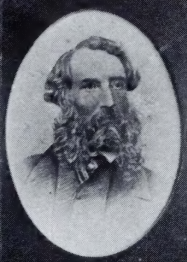
GOVERNORS & ADMINISTRATORS OF NEW ZEALAND 1840-1914

Capt. William Hobson R.N.
1840 - 1842

Lieut. Willoughby Shortland
1842 - 1843

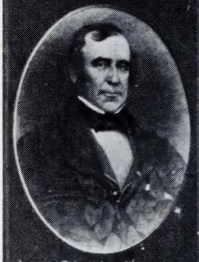


Capt. Robert Fitzroy R.N.
1843 - 1845

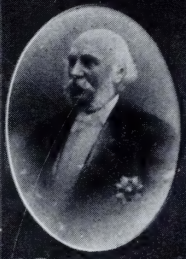


Edmund John Eyre.
1847 - 1853

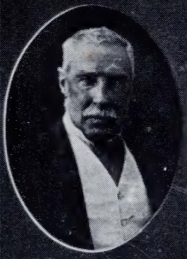
General Dean Pitt
1846 - 1851



Lieut. Col. Robert Henry Wynyard. C.B.
1854 - 1855

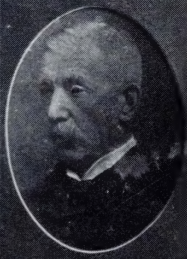


Col. Thomas Gore-Browne C.B
1855 - 1861

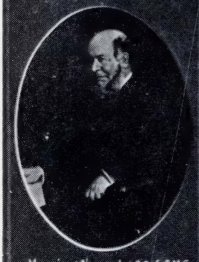


Sir George Grey K.C.B.
1845-1853 & 1861-1868

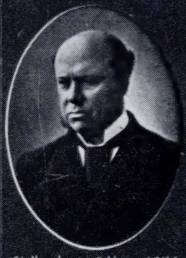
Sir George Ferguson Bowen G.C.M.G.
1868 - 1873



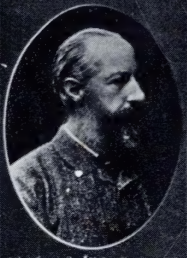
Sir James Fergusson (Bart) P.C.
1873 - 1874



Marquis of Normanby P.C. G.C.M.G
1874 - 1879



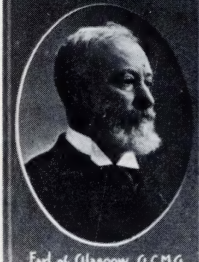
Sir Hercules G.R. Robinson G.C.M.G.
1879 - 1880



Hon. Sir Arthur H. Gordon G.C.M.G.
1880 - 1882

Lieut-Gen. Sir Wm F. Jervois G.C.M.G. C.B.
1883 - 1889

Earl of Onslow G.C.M.G.
1889 - 1892



Earl of Glasgow G.C.M.G.
1892 - 1897

Earl of Ranfurly G.C.M.G.
1897 - 1904

Rt. Hon. Baron Plunket K.C.M.G. K.C.V.O.
1904 - 1910

Rt. Hon. Baron Islington K.C.M.G. D.S.O.
1910 - 1912

Rt. Hon. Earl of Liverpool K.C.M.G. M.V.O.
1912 - 1914